

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

NOTICE OF DEMURRERS AND DEMURRERS.....	1
DEMURRERS AND SUMMARY OF ARGUMENT	1
MEMORANDUM OF POINTS AND AUTHORITIES.....	4
STATEMENT OF THE CASE.....	4
A. Background	4
B. The Settlement Agreement and the Note	4
C. The Release and Waiver	5
D. The modification agreement	7
E. Mr. Heaton made all payments through October 2009	7
F. The Complaint	7
G. CVA sought and obtained an ex parte writ of attachment against Mr. Heaton and his assets.	9
ANALYSIS.....	9
I. CVA RELEASED AND WAIVED THE THIRD THROUGH NINTH CAUSES OF ACTION IN THE SETTLEMENT AGREEMENT.....	10
II. THE CLAIM OF FALSE PROMISE OR PROMISSORY FRAUD IS NOT AND CANNOT BE SUFFICIENTLY PLED BECAUSE MR. HEATON PERFORMED AND PAID FOR TWO YEARS.....	11
III. THE THIRD THROUGH NINTH CAUSES OF ACTION ARE ALSO BARRED BY THE DOCTRINE OF ELECTION OF REMEDIES BECAUSE CVA SUED ON THE CONTRACT AND ALSO SOUGHT, OBTAINED AND SERVED A WRIT OF ATTACHMENT BASED ON THE CONTRACT.....	12
IV. AMENDMENT IS NOT POSSIBLE.....	15
CONCLUSION.....	15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

<u>Bancroft v. Woodward</u> , 183 Cal. 99 (1920).	13
<u>Bank of America v. Salinas Nissan</u> , 207 Cal. App. 3d 260 (1989).	13
<u>Robinson Helicopter Co. v. Dana Corp.</u> , 34 Cal. 4th 979 (2004).	11
<u>Steiner v. Rowley</u> , 35 Cal. 2d 713 (1950)	13,14
<u>Tenzer v. Superscope Inc.</u> , 39 Cal. 3d 18 (1985).	11,12
CCP § 483.010	13

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3

4
5
6
7
8

9

10
11
12
13
14

15
16
17
18
19
20
21
22

23
24
25
26
27
28

1 not overcome the release. The complaint itself also destroys any
2 claim for false promise, because the complaint admits Mr. Heaton
3 made all payments under the Settlement Agreement and Note for two
4 years, a total of over \$250,000.

5 As a further grounds for the demurrer, while normally
6 plaintiff may join inconsistent theories in the same pleading,
7 however, CVA has obtained and recorded an ex parte writ of
8 attachment on defendant and his assets. A writ of attachment is
9 only available on a contract claim, not for fraud or rescission.
10 By obtaining and enforcing his writ, CVA made an irrevocable
11 election of remedies and can no longer sue for fraud in the
12 inducement or rescission of the same contract, or claims based on
13 said rescission.

14 Thus:

15 1. The third cause of action for fraud in the inducement of
16 the settlement agreement is barred by the release and waiver and
17 by CVA's election of remedies.

18 2. The third cause of action also fails to state facts
19 sufficient to constitute a claim, to the extent it is based on
20 alleged false promise.

21 3. The fourth cause of action for "rescission based on
22 fraud" of the settlement agreement is barred by the release and
23 waiver and by CVA's election of remedies.

24 4. The fourth cause of action also fails to state facts
25 sufficient to constitute a claim, to the extent it is based on
26 alleged false promise.

27 5. The fifth cause of action for fraud is barred by the
28 release and waiver and by CVA's election of remedies.

1 6. The sixth cause of action for breach of fiduciary duty
2 is barred by the release and waiver and by CVA's election of
3 remedies.

4 7. The seventh cause of action for conversion is barred by
5 the release and waiver and by CVA's election of remedies.

6 8. The eighth cause of action for "constructive trust" is
7 barred by the release and waiver and by CVA's election of
8 remedies.

9 9. The sixth cause of action for accounting is barred by
10 the release and waiver and by CVA's election of remedies.

11
12 Nov. 15, 2009



Saied Kashani
Attorney for Doyle Heaton

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

A. Background

The evidence will ultimately show CVA's allegations are completely unfounded, but this demurrer takes the pleading as true, as it must. Plaintiff CVA (through its predecessor Centennial Homes Inc.) and defendant Doyle Heaton formed Atherton Ranch LLC to develop certain real property. Complaint ¶ 5. The parties had a financial dispute. CVA contended Mr. Heaton had misappropriated funds and/or that profits had not been properly distributed to the members of the LLC. Id. ¶ 6. In October 2007, CVA presented an accounting that showed that Mr. Heaton had allegedly taken an additional \$2.2 million out of Atherton. Id. ¶ 8.

In October 2007, the parties met to reconcile their respective accountings. CVA does not contend that Mr. Heaton presented any incorrect information as part of this reconciliation.

B. The Settlement Agreement and the Note

On November 25, 2007, the parties entered into a written "Settlement Agreement and Mutual Release." Id. ¶ 9. As material consideration for the agreement and release, Mr. Heaton signed a note in favor of CVA in the amount of \$1,069,934 in full satisfaction of all of CVA's claims. Id. ¶ 10.

Importantly, the consideration for the settlement agreement was that Mr. Heaton *sign* the note, and thereby become personally liable to pay the \$1,069,934 to CVA. Specifically, Section 2, Terms of Settlement, provided:

1 2.1 Heaton... shall execute a Promissory
2 Note in favor of CHI [now plaintiff CVA], a
3 copy of which is attached as Exhibit B...

4 The promissory note was in favor of CVA and in the amount of
5 \$1,069,934, payable in quarterly installments of principal and
6 monthly installments of interest. Exhibit B to complaint.

7 **C. The Release and Waiver**

8 The settlement agreement contained full mutual releases of
9 all claims, known and unknown, and a waiver of the terms of Civil
10 Code § 1542. Section 3.1 provided:

11 Upon the satisfaction of the conditions set
12 forth in Paragraph 2 above, the Parties shall
13 be deemed to have fully and forever released,
14 discharged and dismissed all claims... known,
15 unknown, contingent, accrued, inchoate or
16 otherwise, which they had or may have now or
17 in the future against the other Parties...
18 related to or arising out of Atherton Ranch
19 LLC.

20 Importantly, the conditions of Paragraph 2 do not include
21 full payment of the note, but only execution of the note by Mr.
22 Heaton. Section 2.4. The condition was only that Mr. Heaton sign
23 the note and thereby personally assume the obligation.

24 Section 4 of the agreement, after quoting Civil Code § 1542,
25 provided:

26 Except as provided for under the terms of this
27 Settlement Agreement, each of the Parties
28 waives and relinquishes any rights and
29 benefits which it may have [under] Section
30 1542... In connection with such waiver and
31 relinquishment, each of the Parties hereto
32 acknowledge that it is aware that it or its
33 attorneys may hereafter discover claims or
34 facts in addition to or different from those
35 which each of them now knows or believes to
36 exist... **but it is the intention of each of**
37 **the Parties hereto to hereby fully, finally**

1 **and forever waive said claims, whether known**
2 **or unknown, suspected or unsuspected.**

3 The Settlement Agreement also contained an integration
4 clause, Section 13, which specifically disclaimed reliance on all
5 other understandings and representations that preceded or
6 accompanied the agreement:

7 This Settlement Agreement contains the entire
8 agreement between the Parties with respect to
9 the subject matter of this Settlement
10 Agreement, is intended as the final expression
11 of such Parties' Agreement... **and supersedes**
12 **all negotiations, stipulations,**
13 **understandings, agreements, representations**
14 **and warranties, if any, with respect to such**
15 **subject matter, which precede or accompany the**
16 **execution of this Settlement Agreement.**

17 The effect of the Settlement Agreement, Note, release and
18 integration language was that all rights and claims were merged
19 into and replaced by the Settlement Agreement and Note.
20 Thereafter, the only claim and only enforceable obligation was
21 payment of the note.

22 Importantly, the release and waiver were complete upon
23 execution of the note and did not await or become effective upon
24 actual payment of the Note. Again, Section 3.1 states clearly
25 that the release is effective "upon satisfaction of the conditions
26 set forth in Paragraph 2." Paragraph 2 includes the condition
27 that Mr. Heaton execute the Note (in para. 2.4), but not that the
28 note be fully paid. Of course, obligations created by the
Settlement Agreement itself were not released, so that if Mr.
Heaton failed to pay, CVA's remedy was to sue for payment of the
note (which it has done).

1 **D. The modification agreement**

2 On January 19, 2009, the parties signed a Note Modification
3 Agreement (complaint Exhibit C). Under the agreement section 4,
4 Mr. Heaton made an advance payment of \$64,000 in the form of an
5 Aston Martin car. The monthly payment amounts were also modified.

6 **E. Mr. Heaton made all payments through October 2009**

7 CVA alleges only that Mr. Heaton missed the October 1, 2009
8 payment of \$1,379.35. Complaint ¶ 15. CVA does not allege any
9 other breaches of the Settlement Agreement or Note. Thus, CVA
10 admits Mr. Heaton made all payments on the note from its execution
11 on November 25, 2007 through October 2009, a space of two years.
12 Mr. Heaton in fact paid over \$250,000 including interest. As a
13 result, as CVA admits, the total amount due on the note fell from
14 \$1,069,934 when signed, plus interest, to only \$827,612 today.

15 **F. The Complaint**

16 Mr. Heaton missed a single payment of \$1,379.35 on October 1,
17 2009. On October 16 (the last day of grace period), CVA sued for
18 nine causes of action as follows:

19 **Counts 1 and 2: Breach of note/breach of settlement**
20 **agreement.** The first and second counts are for payment of the
21 Note and breach of the settlement agreement. The alleged breach
22 is, primarily, failure to pay the October 1, 2009 installment of
23 \$1379.35. Based on this single late payment, CVA has purported to
24 accelerated the note and demands immediate payment of the entire
25 unpaid balance of \$827,612.

26 Mr. Heaton's defenses to counts 1 and 2 are factual in nature
27 and not the subject of this demurrer.

28 **Count 3: "Fraud in the inducement"** CVA claims it was

1 fraudulently induced to enter into the Settlement Agreement.
2 However, CVA does not allege that Mr. Heaton misrepresented any
3 facts, such as the financial status of Atherton or amounts due.
4 Instead, CVA alleges only (complaint ¶ 25):

5 When Heaton made the representations and
6 promises to Morgan **that he would pay plaintiff**
7 **the agreed sums...** Heaton knew the
8 representations and promises were false.

9 In other words, the only "fraud" alleged is "promissory
10 fraud" or "false promise," i.e., that Mr. Heaton signed the note
11 without present intention to perform. CVA alleges no facts
12 whatsoever to support this claim. Indeed, the complaint belies
13 this claims, as it admits Mr. Heaton faithfully paid the note for
14 two years, total payments over \$250,000, until Mr. Heaton's
15 financial losses rendered him unable to pay further. CVA claims
16 that it entered into the settlement agreement based on this
17 alleged false promise.

18 **Count 4: "Rescission Based on Fraud in the inducement"** CVA
19 asks to set aside the Settlement Agreement based on the "fraud in
20 the inducement" alleged in Count 3. Again, the sole "fraud" is
21 the alleged false promise, or promise to pay made without
22 intention to perform. CVA does not allege any factual
23 misrepresentations.

24 **Count 5: "Fraud"** The fraud alleged against Mr. Heaton in the
25 fifth cause of action is the alleged "underlying" fraud relating
26 to the operations of Atherton Ranch LLC. This, of course, is the
27 same alleged fraud that is resolved and released in the Settlement
28 Agreement and Mutual Release (Exhibit A).

Counts 6, 7 and 8: "Breach of Fiduciary Duty", "Conversion"

EXHIBIT E

8

1 **and "Constructive Trust."** The torts alleged here are the
2 underlying claims relating to the operation of Atherton Ranch.
3 These claims were also released in the Settlement Agreement.

4 **Count 9: "Accounting"** This cause of action prays for an
5 accounting of the affairs of Atherton Ranch LLC. Again, this is a
6 claim that was resolved and released in the Settlement Agreement.

7 **G. CVA sought and obtained an ex parte writ of attachment**
8 **against Mr. Heaton and his assets.**

9 On October 20, 2009, in this case, CVA sought and obtained an
10 ex parte Right to Attach Order and Writs of Attachment against Mr.
11 Heaton and his assets. See Exhibit 1, attached. Within 48 hours,
12 CVA served the writs on Mr. Heaton's property and on Mr. Heaton
13 personally. Exhibit 2 (notice of attachment). In addition to
14 causing Mr. Heaton great distress, the writs constituted a lien on
15 Mr. Heaton's property.

16 An attachment is not available on a tort claim. To obtain
17 the writ, CVA relied entirely upon the Note and Settlement
18 Agreement. See CVA's Ex Parte Application for Writ of Attachment
19 (exhibit 3). In its papers, CVA stated that it had accelerated
20 the note and demanded an attachment in the accelerated note amount
21 of \$827,612 plus interest, fees and costs, for a total of
22 \$902,226.22 Exhibit 1. The application made clear that
23 attachment was sought on the note. Exh. 3, second page, part 8.

24
25
26
27 **ANALYSIS**
28

1 **I. CVA RELEASED AND WAIVED THE THIRD THROUGH NINTH CAUSES OF**
2 **ACTION IN THE SETTLEMENT AGREEMENT.**

3 In the Settlement Agreement, CVA expressly waived all claims,
4 known or unknown, arising in the past, present or future, arising
5 out of or related to Atherton Ranch. CVA also waived the
6 operation of Civil Code § 1542 dealing with unknown claims. The
7 only claims preserved were those created by the Settlement
8 Agreement itself, i.e., payment of the Note. Any claims CVA might
9 have had before, were merged into and replaced by the Settlement
10 Agreement and Note.

11 CVA's fifth through ninth causes of action for underlying
12 fraud, breach of fiduciary duty, conversion, constructive trust
13 and accounting, all arose out of Atherton Ranch. These claims
14 were all waived. CVA cannot bring these claims. To do so, is
15 itself a breach of the Settlement Agreement.

16 CVA's third and fourth causes of action are for "false
17 promise" fraud and "rescission" based on said fraud. Both claims
18 "arise out of or are related to" Atherton Ranch LLC. Depending on
19 one's point of view, these claims either arose when the Settlement
20 Agreement was signed or afterwards, when the monthly payment was
21 missed, but either way, these claims were waived. The Settlement
22 waived present and future claims, known and unknown.

23 Nor can CVA rely on some "extrinsic" fraud. First, any such
24 claim was released in the general release and waiver of unknown
25 claims. Second, the integration clause states that the
26 obligations of the Settlement Agreement itself replaces any
27 "warranties or representations" made prior to or accompanying the
28 Agreement. CVA contends that in connection with the agreement,

1 Heaton allegedly represented he would pay without intention to
2 pay. Query whether this is even a valid claim (see below). But
3 even if it were, this representation "accompanied" the agreement.
4 Per the integration clause, the Settlement Agreement itself
5 replaced all such representations. Again, thereafter CVA's only
6 remedy was to sue to enforce the Note and Settlement Agreement.

7 As explained above, the release and waiver were complete when
8 the Settlement Agreement was signed, and did not require or await
9 full payment under the Note. Thus CVA's sole remedy at this time
10 is to sue on the note, as it did in its first and second causes of
11 action.

12 **II. THE CLAIM OF FALSE PROMISE OR PROMISSORY FRAUD IS NOT AND**
13 **CANNOT BE SUFFICIENTLY PLED BECAUSE MR. HEATON PERFORMED AND**
14 **PAID FOR TWO YEARS.**

15 Promissory or "false promise" fraud must be alleged with
16 particularity. Generalized and conclusory allegations, for
17 example the unsupported and undifferentiated allegation that
18 defendant "made the promise without intending to perform" is
19 insufficient. Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th
20 979, 994 (2004). The policy of "liberal construction of the
21 pleadings" will not save a complaint that is defective in this
22 respect. Id.

23 In addition, to allege false promise fraud, "something more
24 than nonperformance is required to prove the defendant's intent
25 not to perform his promise." Tenzer v. Superscope Inc., 39 Cal.
26 3d 18, 30 (1985). "If plaintiff adduces no further evidence of
27 fraudulent intent than proof of nonperformance of an oral promise,
28 he will never reach a jury." Id. In Tenzer, the Supreme Court
disapproved prior cases that suggested that nonperformance, alone,

1 could establish false promise. Id. at 31. If that were true,
2 every breach of contract would automatically become a fraud case
3 by simply alleging intent not to perform.

4 CVA has alleged nothing more than Mr. Heaton did not perform.
5 This is insufficient to plead promissory fraud.

6 Even this allegation is patently false based on the complaint
7 itself, and thus cannot be cured by amendment. The complaint
8 admits Mr. Heaton made payments for two years, until October 2009,
9 and paid the note down from \$1,069,934 plus interest to \$827,612.
10 So far from "not performing," Mr. Heaton performed and paid for
11 two years. All Mr. Heaton did was miss a single payment of
12 \$1,379.35, two years after signing the note. Given that Mr.
13 Heaton performed for two years, CVA cannot plead a lack of
14 intention to perform when the agreement was signed.

15 Because the promissory fraud/rescission counts fail, to the
16 extent CVA hopes to rescind the Settlement Agreement and escape
17 the release based on these counts, this attempt also fails.
18 Therefore, counts five through nine remain released and waived
19 under the Settlement Agreement.

20 **III. THE THIRD THROUGH NINTH CAUSES OF ACTION ARE ALSO BARRED BY**
21 **THE DOCTRINE OF ELECTION OF REMEDIES BECAUSE CVA SUED ON THE**
22 **CONTRACT AND ALSO SOUGHT, OBTAINED AND SERVED A WRIT OF**
ATTACHMENT BASED ON THE CONTRACT.

23 In this case, CVA sued for both breach and damages of the
24 Settlement Agreement, and for rescission of the very same
25 agreement based on fraud. The remaining counts for fraud in the
26 underlying Atherton project, in turn, depended on said rescission,
27 because otherwise all such claims were waived in the Settlement
28 Agreement. Thus, CVA's claims are plainly inconsistent: The

1 first and second causes of action are for breach of the Settlement
2 Agreement. The remaining causes of action are for rescission of
3 the same agreement and tort claims made possible only by said
4 rescission.

5 "A party induced to enter into a transaction by fraud,
6 affirms the transaction when he brings an action for damages and
7 because of the affirmance loses any right to disaffirm
8 subsequently." Bancroft v. Woodward, 183 Cal. 99, 101-102 (1920).
9 CVA has sued for payment under the contract (first and second
10 causes of action), and may not now sue to rescind the same
11 contract. If rescission (third and fourth counts) fail, the
12 remaining counts also fail.

13 CVA may contend it is entitled to plead in the alternative.
14 CVA lost that right, and elected its remedy, when it obtained the
15 ex parte writ of attachment. A writ of attachment is only
16 available on a direct contractual claim for a sum of money. CCP §
17 483.010; Bank of America v. Salinas Nissan, 207 Cal. App. 3d 260,
18 271 (1989). It is not available on a tort claim, such as for
19 fraud, and is obviously not available if the plaintiff rescinds
20 the contract.

21 In Steiner v. Rowley, 35 Cal. 2d 713 (1950), Steiner like
22 CVA, pled causes of action for money had and received (a
23 contractual claim) and for fraud and punitive damages related to
24 the same transaction and sum of money. Steiner obtained a writ of
25 attachment against Rowley. The court thereafter sustained a
26 demurrer to the tort claims without leave to amend.

27 The Supreme Court affirmed. Having obtained the writ of
28 attachment, which is only available on a contract claim, Steiner

1 could not thereafter sue in tort (35 Cal. 2d at 720):

2 Concerning the effect of the writ of
3 attachment obtained by the Steiners, the
4 doctrine of election of remedies is based upon
5 the principle of estoppel. "Whenever a party
6 entitled to enforce two remedies either
7 institutes an action upon one of such remedies
8 or performs any act in pursuit of such remedy,
9 whereby he has gained any advantage over the
10 other party, . . . he will be held to have
11 made an election of such remedy, and will not
12 be entitled to pursue any other remedy for the
13 enforcement of his right."

14 . . .

15 An action for tort in which exemplary damages
16 are sought is inconsistent with one for money
17 had and received. (Civ. Code, § 3294.) The
18 Steiners were therefore required to make a
19 timely election of remedies. Pleading the two
20 causes of action in the alternative did not
21 constitute an election because inconsistent
22 counts are permissible and an election cannot
23 be forced by demurrer. **But the Steiners also
24 obtained an attachment. This was a positive
25 act of a plaintiff "in pursuit of . . . [the
26 contractual remedy] . . . whereby he has
27 gained . . . advantage over the other party.
28 . . ."** (*DeLaval Pac. Co. v. United C. & D.
Co.*, 65 Cal.App. 584, 586 [224 P. 766].) **The
Steiners were thereafter estopped to allege a
cause of action in tort, and the demurrer as
to the fourth count was properly sustained.**

[internal citations omitted]

22 The instant case is even stronger. CVA sues on the contract,
23 and then sues in tort to rescind the same contract. Pleading in
24 the alternative is permitted. But CVA's writ of attachment is
25 only available on the contract claim. CVA cannot obtain a writ on
26 the contract, to Mr. Heaton's great detriment, and then continue
27 to sue to rescind that same contract (and also bring tort claims
28 resulting from rescission).

1 CVA has elected its remedy. The tort claims (third through
2 ninth causes of action) should be dismissed on this grounds as
3 well.

4 **IV. AMENDMENT IS NOT POSSIBLE.**

5 The defects cannot be cured by amendment. The release and
6 waiver will not go away. CVA already obtained and served the writ
7 of attachment. The lien and detriment caused cannot be undone
8 even if the lien were subsequently lifted.

9 **CONCLUSION**

10 This is now exclusively a case for breach of contract and
11 failure to pay the note. The demurrer to the remaining causes of
12 action should be sustained without leave to amend.

13 DATED: November 16, 2009

14 

15 Saied Kashani
16 Attorney for Doyle Heaton
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT E

15

REQUEST TO TAKE JUDICIAL NOTICE

Demurring party Doyle Heaton requests this Court to take judicial notice of the following papers from this case:

1. Ex parte right to attach order, issued October 16, 2009.
2. Notice of Attachment and levy of attachment served by plaintiff CVA (with cover letter)
3. CVA's ex parte application for right to attach order.

DATED: November 16, 2009



Saied Kashani
Attorney for Doyle Heaton

EXHIBIT E

16

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California.
I am over the age of 18 and not a party to the within action.

On **November 16, 2009**, I served the following documents:

DEMURRERS TO COMPLAINT

 X by placing copies thereof enclosed in sealed envelopes
addressed as follows:

Steven A. Simontacchi
Phillips, Downs & Simmontacchi
55 Shaver Street, Suite 330
San Rafael, CA 94901

by telecopy to (415) 781-2635

 — By mail: I deposited the envelope, with postage
 X thereon, into the United States mails at Los Angeles,
 — California.

 x Executed on **Nov. 16, 2009** at Los Angeles, California.

 —
 x I declare under penalty of perjury under the laws of the
 — State of California that the above is true and correct.
 —


Louis Valentine